

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY BUTLER,

v.

W. GITTERE, *et al.*,

Petitioner,

Case No. 3:20-cv-00560-MMD-WGC

ORDER

Respondents.

Petitioner Anthony Butler, a Nevada state prisoner, has submitted a *pro se* Petition for Writ of Habeas Corpus (ECF No. 1-1) pursuant to 28 U.S.C. § 2254. This habeas matter is before the Court for initial review under the Rules Governing Section 2254 Cases,¹ as well as consideration of Butler's Motion for Appointment of Counsel (ECF No. 1-2). For the reasons discussed below, the Court orders Butler to show cause why the petition should not be dismissed as untimely and unexhausted, and denies his motion.

I. BACKGROUND

Butler challenges a conviction and sentence imposed by the Eighth Judicial District Court for Clark County (“state court”). See *State of Nevada v. Butler*, Case No. 08C247299.² In May 2012, Butler entered a guilty plea to one count of sexual assault with a minor under the age of 14 and three counts of lewdness with a child under the age of 14. A judgment of conviction was entered September 24, 2012. Butler did not appeal the

¹All references to a “Habeas Rule” or the “Habeas Rules” in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

²The Court takes judicial notice of the online docket records of the Eighth Judicial District Court and Nevada appellate courts. The docket records may be accessed by the public online at: <https://www.clarkcountycourts.us/Anonymous/default.aspx> and <http://caseinfo.nysupremecourt.us/public/caseSearch.do>.

1 conviction or file a state petition for writ of habeas corpus within the time allowed under
 2 Nevada law. See Nev. R. App. P. 4(b) (providing that a notice of appeal must be filed
 3 within 30 days of entry of judgment of conviction); NRS 34.726 (stating that a state petition
 4 seeking post-conviction relief must be filed within one year).

5 In July 2018, Butler filed a motion to modify his sentence, requesting a modification
 6 because he was young when he committed the offenses, mentally unstable, and did not
 7 understand the court proceedings or the consequences of his guilty plea. The state court
 8 denied the motion as his claims fell outside the narrow scope of claims permissible in a
 9 motion to modify a sentence under Nevada law.³ In October 2019, the Nevada Court of
 10 Appeals affirmed the state court's decision.

11 Butler filed a state petition for writ of habeas corpus in August 2018. See *Butler v.*
 12 *Warden Baca*, Case No. A-18-780059-W. However, the case was closed in February 2020
 13 without a response or merits decision.

14 On September 28, 2020, Butler initiated this federal habeas corpus proceeding *pro*
 15 *se.* (ECF No. 1.) The Court instructed him to resolve the filing fee, and he timely complied.
 16 (ECF Nos. 3, 4.) His petition brings four substantive claims for relief in relation to his 2012
 17 conviction. (ECF No. 1-1.) He alleges ineffective assistance of counsel, and violations of
 18 both equal protection and due process under the United States Constitution.

19 **II. ORDER TO SHOW CAUSE**

20 Pursuant to Habeas Rule 4, the assigned judge must examine the habeas petition
 21 and order a response unless it "plainly appears" that the petitioner is not entitled to relief.
 22 See *Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to
 23 screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably
 24 incredible, false, or plagued by procedural defects. See *Boyd v. Thompson*, 147 F.3d
 25

26 ³In Nevada, a motion to modify or correct sentence may only challenge the facial
 27 legality of the sentence—*i.e.*, either the state district court was without jurisdiction to
 28 impose a sentence or the sentence was imposed in excess of the statutory maximum. See
Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).

1 1124, 1128 (9th Cir. 1998); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

2 **A. Timeliness**

3 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) establishes a one-
 4 year limitation period for state prisoners to file a federal habeas petition under 28 U.S.C.
 5 § 2254. The one-year limitation period, *i.e.*, 365 days, begins to run from the latest of four
 6 possible triggering dates, with the most common being the date on which the petitioner’s
 7 judgment of conviction became final by either the conclusion of direct appellate review or
 8 the expiration of the time for seeking such review. See *id.* § 2244(d)(1)(A). When no direct
 9 appeal is filed, a judgment of conviction becomes final when the time period for seeking
 10 such review expires. *Id.*; *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (when a state
 11 prisoner “does not seek review in a State’s highest court, the judgment becomes ‘final’ on
 12 the date that the time for seeking such review expires”). For Nevada prisoners, a notice of
 13 appeal must be filed “with the district court clerk within 30 days after the entry of the
 14 judgment or order being appealed.” Nev. R. App. P. 4(b)(1).

15 Here, Butler did not file a direct appeal. Thus, his conviction became final when the
 16 time expired for filing a notice of appeal with the Nevada appellate courts on October 24,
 17 2012. The AEDPA statute of limitations began to run the following day and expired 365
 18 days later on October 25, 2013. Accordingly, absent another basis for tolling or delayed
 19 accrual, Butler filed his petition over seven years after the limitations period expired. He
 20 must therefore show cause in writing why the petition should not be dismissed with
 21 prejudice as time-barred.

22 Butler is informed that the one-year limitation period may be equitably tolled.
 23 Equitable tolling is appropriate only if a petitioner can show: (1) he has been pursuing his
 24 rights diligently, and (2) some extraordinary circumstance stood in his way and prevented
 25 timely filing. See *Holland v. Florida*, 560 U.S. 631, 649 (2010). Equitable tolling is
 26 “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and “the
 27 threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow
 28 the rule,” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quotation omitted). The

1 petitioner ultimately has the burden of proof on this “extraordinary exclusion.” *Id.* at 1065.
2 He accordingly must demonstrate a causal relationship between the extraordinary
3 circumstance and the lateness of his filing. See e.g., *Spitsyn v. Moore*, 345 F.3d 796, 799
4 (9th Cir. 2003); *accord Bryant v. Arizona Att'y General*, 499 F.3d 1056, 1061 (9th Cir.
5 2007). In addition, under certain circumstances, the one-year limitation period may begin
6 running on a later date or may be statutorily tolled. See 28 U.S.C. § 2244(d)(1)(B), (C),
7 (D) & (d)(2).

8 If Butler seeks to avoid application of the limitation period based upon a claim of
9 actual innocence, he must come forward with new reliable evidence tending to establish
10 actual factual innocence, *i.e.*, tending to establish that no juror acting reasonably would
11 have found him guilty beyond a reasonable doubt. See *McQuiggin v. Perkins*, 569 U.S.
12 383 (2013); *House v. Bell*, 547 U.S. 518 (2006); *Lee v. Lampert*, 653 F.3d 929 (9th Cir.
13 2011) (en banc). In this regard, “actual innocence” means factual innocence, not mere
14 legal insufficiency.” *Bousley v. United States*, 523 U.S. 624, 623 (1998).

15 B. **Exhaustion**

16 In addition to being untimely, it appears likely that Butler’s petition is subject to
17 dismissal as wholly unexhausted in Nevada courts. A state prisoner first must exhaust
18 state court remedies on a habeas claim before presenting that claim to the federal courts.
19 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement ensures that the state courts, as
20 a matter of comity, will have the first opportunity to address and correct alleged violations
21 of federal constitutional guarantees. See *Coleman v. Thompson*, 501 U.S. 722, 730-31
22 (1991). “A petitioner has exhausted his federal claims when he has fully and fairly
23 presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014)
24 (citation omitted). To satisfy the exhaustion requirement, a claim must have been raised
25 through one complete round of either direct appeal or collateral proceedings to the highest
26 state court level of review available. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 844-45
27 (1999); *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). A properly
28 exhausted claim “must include reference to a specific federal constitutional guarantee, as

1 well as a statement of the facts that entitle the petitioner to relief.” *Woods*, 764 F.3d at
 2 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)).

3 Butler did not challenge his judgment of conviction on direct appeal to Nevada’s
 4 appellate courts. He filed a state habeas petition but the case was closed without a
 5 response or merits decision.⁴ Although he litigated a motion to modify his sentence
 6 through one complete round of state proceedings, the available state records indicate that
 7 his request was based on Nevada law—not the United States Constitution—and involved
 8 completely different factual allegations. See *Castillo v. McFadden*, 399 F.3d 993, 999 (9th
 9 Cir. 2005) (fair presentation requires both the operative facts and federal legal theory upon
 10 which a claim is based). Accordingly, Butler will be required to show cause why this action
 11 should not be dismissed because of his failure to exhaust any claim in state court.

12 **III. MOTION FOR APPOINTMENT OF COUNSEL**

13 Turning to Butler’s motion for appointment of counsel, there is no constitutional right
 14 to appointed counsel in a federal habeas corpus proceeding. See *Luna v. Kernan*, 784
 15 F.3d 640, 642 (9th Cir. 2015) (citing *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007)).
 16 An indigent petitioner may request appointed counsel to pursue that relief. 18 U.S.C.
 17 § 3006A(a)(2)(B). The decision to appoint counsel is generally discretionary. See *id.*
 18 (authorizing appointed counsel “when the interests of justice so require”). However,
 19 counsel must be appointed if the complexities of the case are such that denial of counsel
 20 would amount to a denial of due process, and where the petitioner is so uneducated that
 21 he is incapable of fairly presenting his claims. See *LaMere v. Risley*, 827 F.2d 622, 626
 22 (9th Cir. 1987); *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980).

23 The petition in this case appears sufficiently clear in presenting the issues that
 24 Butler wishes to raise, and the legal issues are not complex. He has submitted numerous

25 ⁴The Court notes that Butler’s state habeas petition was filed in August 2018, nearly
 26 six years after the judgment of conviction was entered. Thus, it was untimely on its face
 27 and procedurally barred under Nevada law. See NRS 34.726 (one-year statute of
 28 limitation), NRS 34.800 (presumption of prejudice where a petitioner files a state habeas
 petition more than five years after entry of the judgment of conviction).

1 filings and followed instructions to resolve the filing fee. The Court appreciates that it is
2 difficult for *pro se* petitioners to pursue their habeas claims and almost every *pro se* party
3 would benefit from representation by counsel. However, Butler has not shown that a denial
4 of counsel would amount to a denial of due process. As such, the motion is denied.

5 **IV. CONCLUSION**

6 It is therefore ordered that Petitioner Anthony Butler must file a "Response to Order
7 to Show Cause" by January 18, 2021, why this action should not be dismissed as untimely
8 and/or unexhausted.

9 It is further ordered that any assertions of fact Butler makes in response to this
10 order to show cause must be detailed, must be specific as to time and place, and must be
11 supported by competent evidence. The Court will not consider any assertions of fact that
12 are not specific as to time and place, that are not made pursuant to a declaration under
13 penalty of perjury based upon personal knowledge, and/or that are not supported by
14 competent evidence Butler filed in the federal record. Butler must attach copies of all
15 materials upon which he bases his argument that the petition should not be dismissed as
16 untimely. Unsupported assertions of fact will be disregarded.

17 It is further ordered that if Butler does not timely respond to this order, the petition
18 will be dismissed without further advance notice. If Butler responds but fails to show with
19 specific, detailed, and competent evidence why the petition should not be dismissed as
20 untimely and/or unexhausted, the action will be dismissed.

21 DATED THIS 3rd Day of December 2020.



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24 MIRANDA M. DU
25 CHIEF UNITED STATES DISTRICT JUDGE
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